INDEX

Subject Index

	Page
Statement as to jurisdiction	1
Opinion below	1
Jurisdiction	2
Statutory provisions sustaining jurisdiction	2
State statute involved	2
Date of the judgment and date of the application for appeal	3
Nature of the case	3
The Federal question presented is substantial	7
Conclusion	15
Appendix—Dissenting opinion in the Court of Special Sessions of the City of New York	16

Table of Cases Cited

Bridges v. *California*, 314 U. S. 252	7
Cantwell v. *Connecticut*, 310 U. S. 296	7
Chaplinsky v. *New Hampshire*, 315 U. S. 568	13
Craig v. *Harney*, 331 U. S. 367	9
Doubleday & Company, Inc. v. *People of the State of New York*, 272 App. Div. 799	2, 5
Gitlow v. *New York*, 268 U. S. 652	7, 13
Halsey v. *New York Society*, 234 N. Y. 1	12
Herndon v. *Lowry*, 301 U. S. 242	7
Home Ins. Co. v. *Dick*, 281 U. S. 397	7
Lovell v. *Griffin*, 303 U. S. 444	9
Lynch v. *New York*, 293 U. S. 52	6
Parmelee v. *United States*, 113 F. (2d) 729	12
Pennekamp v. *Florida*, 328 U. S. 331	7
People v. *Berg*, 241 App. Div. 543, 269 N. Y. 514	12
People v. *Pesky*, 230 App. Div. 200, 254 N. Y. 373	12
People v. *Winters*, 294 N. Y. 545	12
Regina v. *Hicklin*, 3 Q. B. 360	12
Schenck v. *United States*, 249 U. S. 47	8
Schneider v. *State*, 308 U. S. 147	13

Page

Stewart & Co. v. *Sadrakula*, 309 U. S. 94 7
Thomas v. *Collins*, 323 U. S. 516 9
Thornhill v. *Alabama*, 310 U. S. 88 9
United States v. *Levine*, 83 F. (2d) 156 12
United States v. *One Book Entitled Ulysses*, 72 F. (2d) 705 12
Winters v. *New York*, No. 3, October Term, 1947 .... 6, 12

STATUTES CITED

Constitution of the State of New York, Article VI, Sec. 18; N. Y. City Crim. Cts. Act, Sec. 31 1
Constitution of the United States:
First Amendment 7, 12
Fourteenth Amendment 2, 6, 7
"Free Speech in the United States"—Chafee 13
"Government and Mass Communications"—Chafee, pp. 59-60 13
Judicial Code, Section 237a, 28 U. S. C. A. 344a, as amended by the Act of January 31, 1928, 28 U. S. C. 861a and 861b 2
New York Penal Law, Subdivision 1 of Section 1141 (New York Laws of 1909, Ch. 88, as amd. by Laws of 1941, Ch. 925) 2

POOR COPY
BLEED THROUGH

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 539

DOUBLEDAY & COMPANY, INC.,
Appellant,

vs.

THE PEOPLE OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

In compliance with Rule 12 of this Court, appellant submits herewith its statement showing the basis upon which it is contended that this Court has jurisdiction upon appeal to review the judgment in the above entitled cause.

Opinion Below

This cause was tried before the Court of Special Sessions of the City of New York, a three-judge court which has jurisdiction to try misdemeanors without a jury (N. Y. Constit., Art. VI, § 18; N. Y. City Crim. Cts. Act, § 31). That court convicted by a divided vote. The majority wrote no opinion. The dissenting Justice wrote an opinion which is appended to this statement. Neither the decision of the court nor the dissenting opinion is reported. Defend-

ant appealed to the Appellate Division of the Supreme Court for the First Judicial Department. There the judgment was affirmed without opinion (272 App. Div. 799). An appeal was then taken to the State Court of Appeals which also affirmed without opinion. That decision has not yet been reported.

Jurisdiction

(a)

This Court has jurisdiction under § 237(a) of the Judicial Code; 28 U. S. C. § 344(a), as amended by the Act of January 31, 1928, 28 U. S. C. §§ 861a, 861b.

(b)

The statute of the State, the validity of which as construed and applied was drawn in question below, is subdivision 1 of Section 1141 of the New York Penal Law (New York Laws of 1909, Chap. 88, as amd. by Laws of 1941, Chap. 925), which, so far as here pertinent, reads as follows:

> "A person who sells * * * or has in his possession with intent to sell, lend, distribute or give away, or to show * * * any obscene, lewd, lascivious, filthy, indecent or disgusting book * * * or who * * * prints, utters, publishes, or in any manner manufactures, or prepares any such book * * * is guilty of a misdemeanor * * *."

Aside from the appellant's concessions below that it published and sold the book "Memoirs of Hecate County," by Edmund Wilson, the only evidence offered by the State was the book itself. Although none of the courts below wrote any opinion, the conviction and the affirmances thereof necessarily implied holdings that the statute applied to that book.

The validity, under the Fourteenth Amendment, of the statute as thus construed and applied to appellant's book,

POOR COPY

BLEED THROUGH

was drawn in question in the courts below and the decision was in favor of its validity.

(c)

The judgment of the New York Court of Appeals, which is sought to be reviewed, was dated November 13, 1947. The date upon which the application for appeal is presented is January 6, 1948.

(d)

Nature of the Case

On July 24, 1946, the District Attorney of New York County filed two informations, numbered 3176 and 3177 against the appellant. No. 3176 contained two counts: The first charged the appellant with publishing an advertisement giving information as to how "a certain obscene, lewd, lascivious, filthy, indecent and disgusting book entitled 'Memoirs of Hecate County' can be purchased"; the second count charged appellant with publishing the same book. No. 3177 charged appellant with selling the same book.

Appellant pleaded not guilty to both informations. Both were then consolidated for trial and, on the State's motion, the first count in No. 3176 was dismissed. At the trial, which was held in the Court of Special Sessions of the City of New York on October 29, 1946, the appellant conceded publication and sale of "Memoirs of Hecate County" and, after the book was received in evidence, the State rested. Appellant then moved to dismiss the informations on the ground that the book is not obscene and:

> "On the further ground that, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, the statute is unconstitutional under Section 6 of the New York State Constitution, guaranteeing liberty of press and liberty of speech;

> In addition, if Section 1141 of the Penal Law includes in its condemnation People's Exhibit 1, that the statute is unconstitutional as a violation of the due process clause of the Fourteenth Amendment of the United States Constitution" (R. 21).

Decision was reserved on this motion.

Appellant then adduced the testimony of two witnesses, one to establish the appellant's reputation as a publishing firm; the other to testify to the reputation of Edmund Wilson, the author of the book, and to the book's literary merit.[1] Appellant and the State then rested and, again, appellant moved to dismiss the information on the ground that the book did not fall within the statute and:

> "On the further ground that, if Section 1141 of the Penal Law is interpreted so as to include People's Exhibit 1, 'Memoirs of Hecate County,' it is unconstitutional under both the New York State and the Federal Constitutions; that in those Constitutions, without limiting the motion to particular sections, it is unconsitutional under Section 8 of the New York State Constitution and in violation of the due-process clause of the Fourteenth Amendment to the Federal Constitution; * * *." (R. 55.)

Again decision was reserved.

On November 27, 1946, the court reconvened and, by a majority vote, denied appellant's motions and found appel-

---

[1] Edmund Wilson is a recognized leading American literary critic. He enjoys a reputation "perhaps higher than any other one critic." His earlier works have been acclaimed by the literary world and some are used as textbooks in literature courses given by leading universities (R. 40-41). "Memoirs of Hecate County" has received serious and lengthy literary reviews in many periodicals which customarily deal with literature, including "United States Quarterly Book List" (which is published by the Library of Congress), the New York Times, the New York Herald Tribune, the Saturday Review of Literature, the Knickerbocker Weekly, and many others.

BLEED THROUGH POOR COPY

lant guilty. The dissenting Justice then filed his opinion, copy of which is appended to this statement. Counsel for the State then announced "that any future publication or printing or selling of this book is a violation of law, established law now of New York City, and will not be tolerated. In that connection I would just like to mention that under the law now anyone who sells it or distributes the book • • • is guilty of a crime and can be sentenced to one year in jail." To which the Justice presiding added "I gather you [the appellant] understand that to be the law" (R. 61). Appellant's motion to set aside the verdict "on the grounds set forth on my motions to dismiss at the end of the People's case and at the end of the entire case" was then denied, and an exception taken (R. 64). Appellant was sentenced to pay a total fine of $1,000 and such fine was paid.

There is no assignment of error practice on appeals taken to New York appellate courts. Accordingly, the only methods of preserving a claim of error in such courts are by brief and argument.

On Appeal to the Appellate Division of the State Supreme Court, the appellant briefed and argued two points: The first was that "Memoirs of Hecate County" is not an obscene book; the second point was that: "Section 1141 of the Penal Law, as applied by the court below to this defendant and to 'Memoirs of Hecate County,' violates both the Federal and State Constitutions." In the latter point, it was argued at length that the statute, as construed and applied, abridged appellant's freedoms of speech and of the press in violation of the Fourteenth Amendment. The Appellate Division affirmed without opinion on May 16, 1947 (272 App. Div. 799).

The same two points were again briefed and argued upon the appeal to the State Court of Appeals. That court also

affirmed without opinion but, in its remittitur, set out the following:

> "Upon this appeal there was presented and necessarily passed upon a question under the Constitution of the United States, viz: The defendant argued that its conviction violated the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States. This Court held that the conviction aforesaid did not violate the right of freedom of speech guaranteed by the Fourteenth Amendment of the Constitution of the United States."

The decision of the Court of Appeals has not yet been reported.

(c)

Appellant's motions at the trial and its briefs and arguments in the appellate courts of the State properly preserved its contention that the statute under which it was convicted, as construed and applied by the New York Court of Appeals in affirming the appellant's conviction, conflicts with the Fourteenth Amendment to the Constitution of the United States in that it denies and unduly restricts freedom of the press.

Moreover, the Court of Appeals considered and decided the appellant's contention that the statute, as construed and applied, was invalid under the Fourteenth Amendment. Its express statement to that effect complies with the requirement stated in *Lynch* v. *New York*, 293 U. S. 52 (1934). The Court of Appeals is the highest court of New York State. Its judgment finally affirms the appellant's conviction.

Accordingly, the question is properly before this Court. *Winters* v. *New York*, October Term, 1947, Docket No. 3, probable jurisdiction noted January 2, 1946; see also the

POOR COPY

BLEED THROUGH

first question framed by this Court when it ordered reargument in the *Winters* case on June 23, 1947.

Other authorities supporting jurisdiction are: *Cantwell* v. *Connecticut*, 310 U. S. 296, 301 (1940); *Stewart & Co.* v. *Sadrakula*, 309 U. S. 94, 97 (1940); *Home Ins. Co.* v. *Dick*, 281 U. S. 397 (1930).

The Federal Question Presented Is Substantial

The substantial question under the Federal Constitution presented on this appeal is: Whether a State statute, which denounces as a misdemeanor the publication and sale of an obscene book, may, consistently with the due process clause of the Fourteenth Amendment, be construed and applied so as to penalize the publication of a *bona fide* work of literature, when such work of literature involves no clear or present danger to the morals of the community. This question does not appear ever to have been presented to or decided by this Court.

That the freedoms of speech and of the press, which are expressly protected by the First Amendment from abridgment by Congress, are also protected by the due process clause of the Fourteenth Amendment from abridgment by the States is now thoroughly settled. *Pennekamp* v. *Florida*, 328 U. S. 331, 335 (1946); *Bridges* v. *California*, 314 U. S. 252, 263, 268 (1941); *Cantwell* v. *Connecticut*, 310 U. S. 296, 303 (1940); *Herndon* v. *Lowry*, 301 U. S. 242 (1937); *Gitlow* v. *New York*, 268 U. S. 652 (1925).

While it is recognized that these freedoms are not without their limitations, the general rule is that the power of a State to abridge them is the exception rather than the rule and "the penalizing even of utterances of a defined character must find its justification in a reasonable apprehension of danger to organized government. The judgment of the legislature is not unfettered. The limitation upon

individual liberty must have appropriate relation to the safety of the state. Legislation which goes beyond this need violates the principle of the Constitution." *Herndon* v. *Lowry, supra,* at p. 258.

The question presented by this appeal is whether New York has so construed and applied Section 1141 of its Penal Law as to transgress the bounds of its legislature's constitutional power. It should be noted that the appellant did not urge below and does not now urge that Section 1141 is invalid on its face. It may be said that, in so far as the statute prohibits the publication of commercial pornography, it finds justification in an appropriate relation to a substantive evil which the State has a right to prevent. But when construed and applied, as it was here, so as to prevent the publication of a *bona fide* work of literature, the statute fails to meet the test defined by this Court's decisions.

That test, although it has been stated in varying terms, is the classic clear and present danger test which, at least since *Schenck* v. *United States,* 249 U. S. 47 (1919), has been consistently applied by this Court to free speech and free press cases. The question in every such case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress or the State legislature has a right to prevent. It is a question of proximity and degree. *Schenck* v. *United States, supra,* at p. 52.

It is true that none of the recent leading cases has applied this now well-established principle to works of fiction. For obvious reasons, the issue has in the past been brought into boldest relief in cases which involve statements or expressions on subjects being currently debated, such as labor disputes, politics, economics, recent judicial decisions, etc. Cf. *Bridges* v. *California, supra,* pp. 268-269 (1941). But the principle is clearly equally applicable to works of fiction,

POOR COPY

BLEED THROUGH

many of which, like the one at bar, are simply an art form of commentary on an identifiable social *milieu*. "Uncle Tom's Cabin" and Voltaire's "Candide" were works of fiction which, under other circumstances, might well have sought and been entitled to the protection of the First and Fourteenth Amendments. "The press in its historic connotation comprehends every sort of publication which affords a vehicle of information and opinion." *Lovell* v. *Griffin*, 303 U. S. 444, 452 (1938).

Cases involving those works would surely have called for the application of principles recognized by this Court when, in *Thornhill* v. *Alabama*, 310 U. S. 88, 102 (1940), it quoted from the letter of the Continental Congress to the Inhabitants of Quebec to the effect that the importance of the freedom of the press consists, among other things, in "the advancement of * * * arts in general"; and when, in *Thomas* v. *Collins*, 323 U. S. 516, 531 (1945) it said: "And the rights of free speech and a free press are not confined to any field of human interest."

The New York Court of Appeals therefore had no basis for refusing to apply to the case at bar the rationale of decisions of this Court governing a wide variety of utterances and publications, including publications alleged to have interfered with the administration of justice, *Bridges* v. *California*, *supra*; *Pennekamp* v. *Florida*, *supra*; *Craig* v. *Harney*, 331 U. S. 367 (1947); utterances alleged to have invoked a breach of the peace, *Cantwell* v. *Connecticut*, *supra*; utterances alleged to have violated statutes dealing with incitement to insurrection, *Herndon* v. *Lowry*, *supra*; speeches made by a union organizer in violation of a statute requiring a license to act as such, *Thomas* v. *Collins*, *supra*; and publications, the distribution of which is declared by statute to be a nuisance, *Lovell* v. *Griffin*, *supra*.

In *Bridges* v. *California*, *supra*, the Court examined the clear and present danger rule and concluded that the "mini-

mum compulsion" of the Bill of Rights was "that the substantive evil must be extremely serious and the degree of imminence extremely high before utterances can be punished" (at p. 263); the guaranty of freedom of the press must be given "the broadest scope that could be countenamed in an orderly society" (at p. 265). In that case, the petitioners had been punished for contempt for publishing comments on matters pending before a State court. The California courts had found in the publications a "reasonable tendency" to interfere with the orderly administration of justice. This Court held such finding unwarranted and, even if warranted, not a sufficient basis to restrict free expression. Applying these principles in *Pennekamp* v. *Florida, supra,* and in *Craig* v. *Harney, supra,* the Court went even further and reversed findings of each of the State courts that a clear and present danger had in fact been created. "We conclude that the danger under this record to fair judicial administration has not the clearness and immediacy necessary to close the door of permissible public comment" (328 U. S. at pp. 349-350).

The fact that these "contempt" cases were decided in the State courts under common law and not under any statute does not detract from their value as precedents for the instant appeal. This was made clear in *Cantwell* v. *Connecticut, supra,* in which the Court considered a conviction for the common law offense of inciting a breach of the peace, alleged to have been committed by the distribution of religious pamphlets and by the playing of phonograph records on the public streets. This situation, said the Court, was "analogous to a conviction under a statute sweeping in a great variety of conduct under a general and indefinite characterization, and leaving to the executive and judicial branches too wide a discretion in its application" (at p. 308). The appellant here was convicted under just such a statute and the question is whether the New York

POOR COPY

BLEED THROUGH

State courts violated the Federal Constitution when they refused to construe it as one "narrowly drawn to define and punish specific conduct as constituting a clear and present danger to a substantial interest of the state." (cf. 310 U. S. at 311).

Other recent decisions of this Court have uniformly stricken down convictions based upon statutes which were deemed to have been applied so broadly as to condemn conduct not constituting such a clear and present danger. In *Herndon* v. *Lowry, supra,* the appellant was convicted of the statutory crime of attempting to incite insurrection. The "crucial question" was held to be "not the formal interpretation of the statute by the Supreme Court of Georgia but the application given it" (at p. 260). *Gitlow* v. *New York, supra,* was held to be no warrant for the contention "that under a law general in its description of the mischief to be remedied and equally general in respect of the intent of the actor, the standard of guilt may be made the 'dangerous tendency' of his words" (at p. 258).

In *Thomas* v. *Collins, supra,* the conviction was for contempt in violating a State court order which enjoined solicitation to membership in a labor union. The order had been made under a statute which prohibited such solicitation without the prior obtaining of a card from the State authorities. This Court reversed because the statute, as applied, punished the appellant for making a speech to a union meeting (323 U. S. at p. 536).

In the instant case, the statute could hardly be more general in its description of the mischief to be remedied. Nor can it be said that interpretative decisions of the New York courts have served to render it any less general. In no case which we have been able to find have the New York appellate courts ever employed it, as they have here, to suppress a work of *bona fide* literature. Quite to the contrary, they seem consistently to have taken pains, when affirming con-

victions under the statute, to point out that the work involved had no literary merit. *People* v. *Pesky*, 230 App. Div. 200, aff'd, 254 N. Y. 373 (1930); *People* v. *Berg*, 241 App. Div. 543, aff'd, 269 N. Y. 514 (1935); *cf. Halsey* v. *New York Society*, 234 N. Y. 1 (1922); and see *People* v. *Winters*, 294 N. Y. 545 (1945) which involved *subsection 2* of section 1141 of the Penal Law and which is now pending decision on direct appeal to this Court after several arguments, *Winters* v. *New York*, October Term, 1947, Docket No. 3, probable jurisdiction noted, January 2, 1946.

Yet the State argued in the courts below and they appear to have held that the work here in question fell afoul of the statute because of its *dangerous tendency* "to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a work of this sort may fall." This was a test derived not from the common law but from an 1868 decision of the British Queen's Bench (*Regina* v. *Hicklin*, 3 Q. B. 360), and since thoroughly discredited by the Federal courts, *United States* v. *One Book Entitled Ulysses*, 72 F. (2d) 705 (C. C. A. 2, 1934); *United States* v. *Levine*, 83 F. (2d) 156 (C. C. A. 2, 1936); *Parmelee* v. *United States*, 113 F. (2d) 729 (App. D. C. 1940).

There was no proof or offer of proof below that the alleged danger was so clear or immediate as to justify suppression of publication. Indeed, the courts below never gave any indication at any time that they were aware of the grave constitutional objection involved. They appear to have wholly ignored "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment" and to the fact that such "priority gives these liberties a sanctity and a sanction not permitting dubious intrusions," *Thomas* v. *Collins*, *supra*, at p. 530. They seem to have been unaware of "the delicate

POOR COPY

BLEED THROUGH

and difficult task" which "falls upon the courts to weigh the circumstances and to appraise the susbtantiality of the reasons advanced in support of the regulation of the free enjoyment of the rights" of freedom of speech and of the press, *Schneider* v. *State*, 308 U. S. 147, 161 (1939).

In pointing this out, the appellant is not unmindful of the dictum of *Chaplinsky* v. *New Hampshire*, 315 U. S. 568, 571-572 (1942) to the effect that certain "well-defined and narrowly limited" classes of *speech* have no constitutional protection and that these include "the lewd and obscene, the profane, the libelous, and the insulting or 'fighting' words —those which by their very utterance inflict injury or tend to incite an immediate breach of the peace." But this quotation, when read in the context of a case involving the utterance of insulting epithets upon the public streets, can have no application to a book, a few pages of which are devoted to an explicit discussion of sex. More applicable would be the principles enunciated by Thomas Jefferson when he rejected the depraving of the public taste as a ground for interfering with the freedom of the press, see *Bridges* v. *California, supra*, note 16. Moreover, it should be noted that the Court in the *Chaplinsky* case cited as authority for the quoted words Professor Chafee's work, *"Free Speech in the United States,"* whereas the same author, in a later work, has elaborated his views and has argued for the constitutional protection of genuine literature from prosecutions for obscurity. Chafee, *Government and Mass Communications* (1947), pp. 59-60.

Since *Gitlow* v. *New York*, 268 U. S. 652 (1925), in which it was first recognized that the Fourteenth Amendment protects against abridgment by the States of freedom of the press, this Court has never passed upon the validity of a conviction for publication of an allegedly obscene book,

where the book so accused was a recognized work of literature. There is now no proper guide for the performance of the delicate task involved in the judging of such a work.

It is peculiarly appropriate that such a guide be delineated at this time and in this case. Now, when the frontiers of suppression are being everywhere extended, this Court will want to consider whether art forms of expression are to be relegated to the role of stepchildren of the First Amendment. Surely the right of free expression in the course of exploration of an expanded universe and the mystery of man cannot be limited to editorial writers, pamphleteers, labor organizers and itinerant ministers and denied to serious literary artists. New York State, the center of the book publishing industry, has in this case allied itself with forces of suppression. It has suppressed a book (and has threatened with imprisonment anyone who sells it in the future) which has been recognized by the literary world as an effective satire on may facets of the lives of the suburbanites of the 1920's and early 1930's. In the form of fiction, the book has commented bitterly on the tastes and politics of that era. In order to present what he thought was a complete picture of a particular social *milieu*, the author has seen fit to devote a few pages of his book to several explicit references to the sexual act. We are confident in suggesting that, when the Court comes to examine the book, it will fail to find in it any basis for a conclusion that it represents an imminent or serious threat to anybody's morals.

This case gives the Court an opportunity to stem further the tide of suppression by recognizing that the First Amendment extends to serious literary expression as well as to other forms. And that question must be considered substantial so long as the channels of enlightenment are to be kept open.

POOR COPY

BLEED THROUGH

Conclusion

WHEREFORE it is respectfully submitted that this appeal in the above entitled cause comes within the proper jurisdiction of this Court.

(Sgd.) WHITNEY NORTH SEYMOUR,
Counsel for Appellant.

APPENDIX

COURT OF SPECIAL SESSIONS OF THE CITY OF NEW YORK, NEW YORK COUNTY

PEOPLE OF THE STATE OF NEW YORK

against

DOUBLEDAY & COMPANY, INC.

Opinion of JUSTICE NATHAN D. PERLMAN:

I am inclined to accept the position taken by the prosecution that the story "The Princess with The Golden Hair" may be considered separately and apart from the rest of the book "Memoirs of Hecate County."

The crucial consideration is the standard to be applied by the court, the concept of obscenity against which the story in question must be tested.

The prosecution would have obscenity defined as that which tends to deprave and corrupt the young and immature, those whose minds are open to such immoral influences and into whose hands the book may fall. I find that concept grossly inadequate and, in fact, detrimental to the best interests of the general public.

Such a standard would exclude from consideration the effect of a story or book on the minds of the mature, those who are not open to such immoral influences. These latter, the bulk of the reading public, must in their daily lives, face, understand and resolve the complex problems of modern life and society. In this connection they have traditionally relied on those artists and writers who possess an acute and sensitive insight into those problems and an ability to convey that insight through the written word.

To adopt a standard of obscenity which would disregard the interests of the mature and ignore the positive and vital contribution which books can make in their lives, is to needlessly sacrifice the welfare of a vast portion of our community. I am confident that such was not the intention of the legislature. Section 1141 of the Penal Law, as every other statute, is fundamentally intended to benefit and pro-

POOR COPY

BLEED THROUGH

tect society as a whole. Consequently it is reasonable to take into account in each case the varied effects of the book or story in question. Any rational evaluation of a book from the point of view of obscenity must give consideration not only to its detrimental tendency to deprave the minds of the young and immature but also to its beneficial tendency to enlighten the mature.

It was this latter aspect which led United States Circuit Judges Augustus N. Hand and Learned Hand and United States District Judge John M. Woolsey in the Ulysses case to place so much stress on the truth, sincerity and art qualities of the book there under consideration. These Judges weighed carefully the standard now urged by the prosecution in the instant case and rejected it. (United States *v.* One Book Called "Ulysses", 72 Fed. 2nd 705; 5 Fed. Supp. 182.)

Giving due weight and consideration to the artistic impact of "The Princess with The Golden Hair" and judging that story as a whole, irrespective of certain passages which by themselves might have a tendency to deprave the young and immature, I find that the story is not obscene within the meaning of Section 1141 of the Penal Law.

The writer of the story is evidently and honestly concerned with the complex influences of sex and of class consciousness on man's relentless search for happiness. That is a problem which is also of deep concern to the matured reading public. That public is entitled to the benefit of the writer's insight and that right may not be lightly disregarded by excluding from consideration all interests but those of the young and immature.

To suppress what may appear bad in a book is also to suppress what is good therein. The Court's primary duty is to interpret all laws in the terms of the general welfare.

I vote to acquit the defendant.

(Sgd.) NATHAN D. PERLMAN,
Justice of the Court of Special Sessions of the City of New York.